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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-973

JONES TRUCK LINES, INC.,
Petitioner,

vs.

RYDER TRUCK LINES, INC. and AMERICAN CASUALTY COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

On page 2 of the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit the "Question Presented" is a correct statement of the issue.

ADDITIONAL STATEMENT OF THE CASE

References prefixed by the letter "R" are to pages of the Appendix filed in the Court of Appeals for the Sixth Circuit.

The petitioner's statement of facts is essentially correct but incomplete and is supplemented herewith.

The petitioner Jones Truck Lines, Inc. (hereinafter referred to as "Jones") is an Arkansas corporation. The respondent Ryder Truck Lines, Inc. (hereinafter referred to as "Ryder") is a Florida corporation doing business in the State of Tennessee. The respondent American Casualty Company (hereinafter referred to as "Surety") is a Pennsylvania corporation which was the surety on certain obligations entered into by Ryder for the purpose of complying with I. C. C. Regulations and certain regulations of the State of Louisiana. The positions of Ryder and Surety in this case are identical, and Surety's only connection with the litigation is by virtue of its surety relationship.

On February 20, 1973, in accordance with a longstanding practice, Jones and Ryder, both corporations operating under I. C. C. Regulations, entered into a one-way lease agreement for the purpose of moving certain goods from Kansas City to Louisiana (Trial Exhibit 3). Jones had accepted a shipment of goods from Owens Corning in Kansas City for movement to West Monroe, Louisiana. Since Jones was not authorized to operate in the State of Louisiana, it was necessary to enter into a one-way lease agreement. In this case a representative of Jones contacted Ryder's agent by long distance telephone, and the agreement was made (R. 82, 83). The shipment of goods was moved from Kansas City, Missouri to Memphis, Tennessee by vehicle exclusively leased to Jones Truck Lines

and operated by its owner, one Orin Taylor (Trial Exhibit 1, R. 107). When the shipment of goods arrived in Memphis, Ryder's agent Mildred Rodocker, in accordance with advance notice from Jones, had prepared the necessary paperwork to comply with the I. C. C. Regulations. This included the preparation of the one-way lease agreement in question (Trial Exhibit 3), the Ryder freight bill (Trial Exhibit 4), the Louisiana fuel certificate and the placard to place on the side of the truck giving the Ryder I. C. C. number and designation (R. 100-104).

When Taylor arrived in Memphis, he presented to Ryder's agent all of the required documentation including his physical examination report (Trial Exhibit 6), his Driver Qualification (Trial Exhibit 7) and the Driver Time Worked Statement (Trial Exhibit 8; R. 98-100).

Although Jones contended in the Complaint that Taylor was not authorized to sign the lease agreement (R. 6, 9), at the trial of the cause this contention was discarded and the authority admitted (R. 88, 89). Taylor signed the one-way lease agreement (Trial Exhibit 3) as agent for Jones.

When Rodocker was contacted by Jones initially, the truck driven by Taylor was already en route from Kansas City to Memphis. Consequently, the transaction for a transfer of control and responsibility of the equipment from Jones to Ryder took place late in the evening between 11:00 P.M. and midnight in Memphis. In accordance with I. C. C. Regulations an inspection of the vehicles was accomplished by agent Rodocker. Inspections were ordinarily made by one Harry Marshall, but his business closed at 8:00 P.M. Consequently, agent Rodocker who was experienced in such inspections did make the inspection and signed Marshall's name to the inspection certificate located on the back of the trip lease just as she had done on

prior occasions as agent for Jones (Trial Exhibit 5). Trial Exhibit 5 is the back of Trial Exhibit 3 which is the lease itself.

Agent Rodocker also served as agent for Jones (R. 80). It is undisputed, of course, that on this occasion she was acting as agent for Ryder. Rodocker had made inspections for Jones on other occasions, and, in fact, had signed inspection reports also using Harry Marshall's name (R. 85, 86, 94-97). The Jones vice-president B. J. Wiseman testified that in making inspections for Jones all he required Rodocker to do was have the equipment inspected in a qualified fashion whether she did it by herself or whether she arranged for a mechanic to do it for her (R. 128). The Court of Appeals found that Jones' contention that I. C. C. Regulations were not complied with in the inspection of the equipment at Memphis to be without merit (See note 1, page A7 of Petition for Certiorari).

The driver Taylor was furnished with the freight bill by Ryder which specified his route from Memphis to West Monroe, Louisiana was by way of Jackson, Mississippi, on Interstate I-55 and I-20, consecutively. The freight bill also specified that Ryder was to be called in case of emergency, and the area code and telephone number of Ryder alone appears thereon (R. 101; Trial Exhibit 4). Contrary to the requirements of that freight bill, Taylor chose an alternate route and was involved in an accident in North Louisiana, out of which certain litigation has arisen in the State of Louisiana (R. 22-26). Following the accident it was the representative of Ryder who contacted the driver, and it was to that individual, rather than an agent of Jones that the driver surrendered his pertinent papers (R. 115, 116).

Ryder from the outset has and does stand ready to defend that litigation or any other suits arising out of the

aforesaid accident but insists that the indemnity provision of the lease is enforceable.

The lease agreement between Jones and Ryder (page A23, Appendix E, Petition for Certiorari) provides in part:

> "It is understood that the leased equipment under this agreement is in the exclusive possession, control, and use of the authorized carrier Lessee and that the Lessee assumes full responsibility in respect to the equipment it is operating to the public, the shipper, and the INTERSTATE COMMERCE COMMISSION. It is agreed that Lessor will carry acceptable Public Liability and Property Damage Insurance. Lessor agrees to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment."

A virtually identical indemnity provision also appeared in such leases utilized by Jones (R. 64).

ARGUMENT

It is contended that the Petition for a Writ of Certiorari should be granted since the decision by the Court of Appeals for the Sixth Circuit in this cause is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Alford* v. *Major,* 470 F.2d 132 (1972). It is conceded that the opinion in the instant case is consistent with the Fourth Circuit opinion in *Carolina Freight Carriers Corporation* v. *Pitt County Transportation Company,* 492 F.2d 243 (C.A. Fourth, 1974) and is consistent with the Fifth Circuit opinion in the case of *Allstate Insurance Company* v. *Alterman Transport Lines, Inc.,* 465 F.2d 710 (C.A. Fifth, 1972).

The basic question decided by the District Court and the Court of Appeals and the one which petitioner contends the Supreme Court should consider is: Whether the requirement of I. C. C. Regulations 49 C.F.R. 1057.4 calling for "exclusive possession, control and use of the equipment" is inconsistent with the indemnity agreement in question so as to make it void and unenforceable?

Following a collision between other vehicles and the truck designated in the one-way lease agreement between Jones and Ryder (page A23, App. E, Petition for Writ of Certiorari) Jones is taking the position that the indemnity agreement contained therein is unenforceable and has brought this declaratory judgment action. Jones contends that even though the vehicle had been leased to Ryder and even though Ryder had assumed exclusive possession, control and use, nevertheless, the indemnification agreement which calls for indemnification constitutes an evasion of the requirements of the said I. C. C. Regulation. It is the position of Ryder that the indemnification agreement not only is not an evasion of the requirements of the I. C. C. Regulation but, in fact, constitutes additional security for the public.

The petitioner Jones seeks a review in this Court on the grounds that the *Alford* case in the Seventh Circuit is in conflict with the previously-mentioned decisions from the Fourth, Fifth and Sixth Circuits which he contends correctly are in agreement with each other. It is the petitioner's position then that by virtue of the *Alford* case that the Seventh Circuit is in conflict with the Fourth, Fifth and Sixth Circuits on this issue and the Petition should be granted.

The respondents would show to the Court that there is no conflict and that *Alford* is clearly distinguishable. Since

there is no conflict in the decision of said Circuits, this Court should not grant the Petition.

The authorities cited by the petitioner give the history of the pertinent regulation and point out that prior to this control there was confusion with regard to the responsibility of the operation of such motor vehicles to the general public. It was the purpose of the aforesaid regulation to clarify this responsibility by requiring that where a lessee utilizes the services of a leased vehicle, that lessee must be exclusively responsible to the general public. This obviously prevented the confusion which existed prior thereto when each carrier would insist that the other was responsible to the detriment of third-parties. It must be kept in mind that regardless of the indemnity agreement herein the respondents at all times and now state that they assume any responsibility to the public required under Section 1057.4.

It is undisputed that this was a shipment under the provisions of Section 1057.4. We would call the Court's particular attention to the one-way lease agreement which is shown in the Appendix in the Petition for Certiorari at page A23. The pertinent language is:

> "Lessor agrees to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment."

Prior to the foregoing quote and in the same paragraph it is stated:

> "It is understood that the leased equipment under this agreement is in the exclusive possession, control and use of the authorized carrier Lessee and that the Lessee assumes full responsibility in respect to the equipment it is operating to the public, the shipper, and the INTERSTATE COMMERCE COMMISSION."

It is clear then that by virtue of this agreement and from all of the evidence at the trial in the District Court it was agreed between the parties that the lessee Ryder did assume exclusive possession, control and use of the vehicle. Ryder directed the route to take. The driver was notified that if he got into any trouble he was to notify Ryder. After the accident the driver surrendered his papers to a representative of Ryder. At no time did Jones exercise or attempt to exercise any control over the vehicle or its driver after it came into the control of Ryder. It is clear then that the parties entered into an agreement consistent with the I. C. C. Regulations cited in Appendix D (page A14) of the Petition for Certiorari.

Does *Alford* disagree with *Alterman, Carolina* and the decision of the Sixth Circuit in this case? In the *Alford* case an indemnifying clause in a trip lease was held unenforceable. A study of the facts of the case, however, shows an entirely different circumstance. As a matter of fact, there the lessee (Major):

> ". . . contends that its indemnification clause may be enforced since the actual care, custody and control of the truck *remained with the lessor carrier* even though Major, consistent with ICC Regulations, assumed full responsibility therefore to the general public. It is Major's position that the ICC Regulations recognize and indeed permit the lessor to furnish its driver to the lessee and that, therefore, these regulations implicitly acknowledge the practical fact that in this situation the lessee carrier has no actual control over the driver furnished by the lessor." (Emphasis added).

On the other hand the respondent-lessee-Ryder in this case insists that the indemnification clause should be enforced since the *exclusive possession, control and use of*

the truck were exercised by the lessee carrier consistent with the regulation under discussion. All of the proof in the District Court supports this proposition. The contention of the lessor is that regardless of who had control the indemnifying clause is not enforceable.

This distinction was clearly pointed out by the Sixth Circuit of the Court of Appeals in its opinion at page A10 of Appendix C in the Petition for Certiorari. Therein the Court stated:

> "The ruling of the Seventh Circuit in *Alford* v. *Major,* 470 F.2d 132 (7th Cir. 1972), that the indemnification agreement considered in that case contravened the I. C. C. regulation is not in conflict with the rulings of the Fourth and Fifth Circuits. This is true for the obvious reason that in *Alford* v. *Major,* supra, the indemnification agreement itself permitted the lessor to retain full control over the truck and driver during the full term of the lease in direct violation of the applicable I. C. C. regulation which specifically requires that the exclusive control of the equipment shall be vested in the lessee for the duration of the lease."

In *Carolina Freight Carriers* v. *Pitt County Transportation Company,* 492 F.2d 243 (C.A. Fourth, 1974) the agreement provided (at page 244) that:

> "Carolina Freight Carriers Corporation, Lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Company, Lessor, of Farmville, North Carolina * * * for its exclusive possession, control and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Agreement . . ."

The Fourth Circuit decided therein that indemnification agreements similar to that under discussion are clearly enforceable and certainly was not in violation of either the "spirit or the letter of the I. C. C. Regulation."

In *Allstate Insurance Company* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710 (C.A. Fifth, 1972) the release provided (at page 713 of the opinion) that:

> ". . . said vehicle shall be solely and exclusively under the direction and control of the lessee [Alterman] who shall assume full common carrier responsibility . . . for the operation of such vehicle."

The indemnfication agreement was there held enforceable since the lessee did assume full possession and control. It is the contention of the petitioner that the enforcement of such an agreement would avoid the requirements of the I. C. C. Regulations. This, of course, is not true. As a matter of fact the indemnifying agreement gives additional security to the general public. The execution of the indemnifying agreement does not in any respect negate the responsibility of the lessee-respondent-Ryder to third-parties. The I. C. C. Regulations set out in the lease agreement agreed to by both parties by signature of their respective agents clearly show that the lessee assumed exclusive possession and control, and it has at all times acknowledged its responsibility to said third parties. Since the agreement provides for additional security, the public has been further protected. As the Court stated in the *Alterman* case:

> "Turning to the indemnification clause itself we find nothing in the language of 49 C. F. R. Section 1057.4 (a) (4) which would prohibit two freely contracting parties from determining, as between themselves,

which party will ultimately bear the cost of damages done to a third person. The only conceivable argument against such an arrangement would be that the regulation seeks to prevent indemnification on the theory that a trucking company, knowing that it does not have to pay damages, might tend to be less careful in supervising and controlling the actions of its truck drivers. However, the same can be said of insurance coverage which the regulations obviously do not prohibit. We are of the opinion that had the I. C. C. intended to prevent indemnification between trucking companies it would have said so in precise terms."

The Sixth Circuit of the Court of Appeals in the cause under consideration at page A11 of the report of that opinion appearing in Appendix C of the Petition for Certiorari said:

"That the lessor in the present case agreed to reimburse the lessee for any losses in no way impairs the public's right of recourse against Ryder for damages caused by its operation of the truck in Louisiana. On the contrary, the indemnification agreement would appear to have the effect of strengthening the possibility of recovery by a third party in that it would provide another source or 'pocket' from which a recovery could be obtained. The argument that the indemnification provision would have the effect of making Ryder less careful in its operation of the vehicle in that it would enable Ryder to transfer its losses to Jones is unconvincing. The uncertainties and inconveniences attendant upon enforcement of such an indemnification provision are alone sufficient to motivate the indemnitee to pursue a course of caution and prudence in its operations. Another factor which would nor-

> mally cause a carrier to avoid accidents or injuries to third persons would be its desire to establish a name for conducting a safe operation to protect itself against a reputation for carelessness or indifference to the rights of others."

Petitioner relies on the Nebraska case of *Denver Midwest Motor Freight, Inc.* v. *Busboom Truck, Inc.*, 190 Neb. 231, 207 N.W.2d 368 (1973). There at page 371 the Supreme Court of Nebraska pointed out:

> "There are obvious factual differences between the *Alford* and the *Allstate* cases upon which they might be distinguished."

The Nebraska Court analysis clearly distinguished it from the case under consideration. At page 371 the Court said:

> "In the case before us the lease form was drawn by the lessee. It did not contain any provision requiring the lessee to assume full common carrier responsibility for the operation of the vehicle."

Compare with the language of the lease under consideration (page A23, Appendix E, Petition for Certiorari) which states:

> ". . . and the Lessee assumes full responsibility in respect to the equipment it is operating to the public, the shipper and the INTERSTATE COMMERCE COMMISSION." (Capitalization appears in the original).

CONCLUSION

The petitioner asks this Court to grant the Petition for Certiorari on the grounds that the *Alford* case in the Seventh Circuit is in conflict with opinions of the Fourth, Fifth and Sixth Circuits. *Alford* is clearly distinguishable, and there is no conflict in the Appellate Courts of the United States on the issue of whether indemnification agreements under 49 C.F.R. 1057.4 are enforceable where the lessee exercises exclusive possession, control and use. Consequently, respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,

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By: /s/ ALBERT T. MCRAE

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